

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 54

Docket No. SF-0752-12-0230-I-1

**Anthony Hernandez,
Appellant,**

v.

**Department of the Navy,
Agency.**

July 18, 2013

Jason L. Aldrich, Esquire, San Diego, California, for the appellant.

Richard D. Ruppe, Esquire, San Diego, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his indefinite suspension. For the reasons set forth below, we DENY the petition for review and SUSTAIN the indefinite suspension.¹

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 By notice dated November 1, 2011, the agency proposed suspending the appellant indefinitely from his position as a Police Officer based on reasonable cause to believe that he had committed a crime for which a sentence of imprisonment might be imposed. Initial Appeal File (IAF), Tab 5 at 56-59. The agency supported its proposal with one specification. *Id.* at 56-57. In the specification, the proposing official asserted that he received information from the San Diego County Superior Court stating that the appellant had been charged with six misdemeanor counts² and was scheduled for a jury trial. *Id.* Following the appellant's written reply to the notice, *id.* at 38-45, the agency effected the indefinite suspension on December 14, 2011. *Id.* at 29-31.

¶3 The appellant filed a Board appeal of his indefinite suspension, alleging that the agency lacked requisite cause to suspend him indefinitely without pay. IAF, Tab 1 at 4. He requested a hearing but subsequently withdrew his request. *Id.* at 3; Tab 10.

¶4 In an initial decision based on the written record, the administrative judge sustained the agency's action, finding that the agency proved that it had reasonable cause to believe that the appellant committed a crime for which a sentence of imprisonment could be imposed and that the indefinite suspension had an ascertainable end. IAF, Tab 13, Initial Decision (ID) at 8. He further determined that a nexus existed between the criminal charges against the appellant, his ability to perform his position, and the agency's mission, and that an indefinite suspension was a reasonable penalty. *Id.* at 8-9.

² The specific charges against the appellant were as follows: two counts of battery; two counts of battery of a current or former significant other; one count of corporal injury to a spouse and/or roommate; and one count of unlawful carrying of a switchblade knife. IAF, Tab 5 at 56-57. Each charge is punishable by imprisonment. *Id.* at 34.

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶6 To sustain an indefinite suspension, the agency must show: (1) It imposed the suspension for an authorized reason; (2) the suspension has an ascertainable end, i.e., a determinable condition subsequent that will bring the suspension to a conclusion; (3) the suspension bears a nexus to the efficiency of the service; and (4) the penalty is reasonable. *Sanchez v. Department of Energy*, [117 M.S.P.R. 155](#), ¶ 9 (2011) (internal citations omitted). One of the authorized circumstances for imposing an indefinite suspension is when the agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed – pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process. *Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 13 (2010). At issue in the present appeal is whether the agency had such reasonable cause.³

¶7 The Board has held that “reasonable cause” in the context of an indefinite suspension based on possible criminal misconduct is virtually synonymous with

³ The administrative judge found that the agency invoked the “crime exception” under [5 U.S.C. § 7513](#)(b)(1), which permits an agency to take a significant adverse action with less than 30 days’ advance written notice only when “there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed.” ID at 2-4. However, the appellant received the agency’s notice of proposed indefinite suspension on November 2, 2011, IAF, Tab 5 at 59, and the suspension did not become effective until December 14, 2011, *id.* at 26. Thus, the appellant received at least 30 days’ advance written notice of his indefinite suspension. Accordingly, the “crime exception” need not be applied in this case. Nevertheless, because the agency invoked the reasonable cause standard as the reason for its action, IAF, Tab 5 at 56, the agency must meet that standard in order for its indefinite suspension action to be sustained, *see generally Gottlieb v. Veterans Administration*, [39 M.S.P.R. 606](#), 609 (1989) (the Board is required to review the agency’s decision on an adverse action on the grounds invoked by the agency).

“probable cause,” which is necessary to support a grand jury indictment, i.e., probable cause to believe that a crime has been committed and that the accused has probably committed it. *Martin v. Department of the Treasury*, [12 M.S.P.R. 12](#), 18-19 (1982), *aff’d sub nom. Otherson v. Department of Justice*, [728 F.2d 1513](#) (D.C. Cir. 1984). In *Dunnington v. Department of Justice*, [1151 F.2d 1151](#) (Fed. Cir. 1992), the Federal Circuit addressed the issue of what constitutes “reasonable cause” in the context of an indefinite suspension of a federal employee. The court stated that an arrest warrant alone is insufficient, as is an actual arrest. *Dunnington*, 956 F.2d at 1157. On the other hand, a formal judicial determination following a preliminary hearing or an indictment following an investigation and grand jury proceedings is more than sufficient. *Id.* The court stated that “the best evidence of reasonable cause will be that determined by the agency after an appropriate investigation of the facts and circumstances of the alleged misconduct.” *Id.*

¶8 The court acknowledged, however, that investigation may not always be possible, or the wisest course. *Dunnington*, 956 F.2d at 1157. More specifically, the court stated that requiring an agency to conduct a full investigation in every case prior to availing itself of the summary suspension provision could unduly delay action necessary to protect the public or the agency. *Id.* at 1156. The court further stated that “[f]rom the individual’s viewpoint, if the employee insisted on his administrative rights it could force a premature airing of the individual’s defense in a pending criminal case; if he did not insist on his rights, it could be taken as a waiver thereof, or possibly even an admission of guilt.” *Id.* Accordingly, the court found that in an appropriate case, the agency must be able to act on the basis of the facts presented to it. *Id.* The court cautioned, however, that “those facts must be sufficient to meet the statutory test of reasonable cause, and the agency must take steps to assure that this is so.” *Id.* The court found that *Dunnington*’s indefinite suspension was proper because, in addition to four arrest warrants, the agency had before it factual material culled from four criminal

complaints and statements from complaining witnesses supporting the criminal complaints. *Id.* at 1156-58.

¶9 Relying on *Dunnington*, the Board further addressed the issue of reasonable cause in *Barresi v. U.S. Postal Service*, [65 M.S.P.R. 656](#), 662-663 (1994). There, the appellants were arrested pursuant to warrants and arraigned on charges of intent to distribute controlled substances. *Id.* at 660. The administrative judge issued an initial decision in which she sustained the indefinite suspensions, finding that the appellants' arrests pursuant to magistrate-issued arrest warrants based on a finding of probable cause were sufficient to sustain the suspensions. *Id.* at 661. The Board reversed the initial decision, finding that the deciding official's reliance on the appellants' arrests and arraignments in deciding to suspend the appellants indefinitely was insufficient to establish reasonable cause under the crime provision of [5 U.S.C. § 7513](#)(b)(1). *Barresi*, 65 M.S.P.R. at 662-663. The Board stated that *Dunnington* required the agency to "take some affirmative action on its own to satisfy itself that there was reasonable cause to believe that a crime was committed for which imprisonment could be imposed." *Id.* at 666. The Board found that, because the agency did not take such an affirmative action before it effected the indefinite suspensions, those actions could not be sustained. *Id.* at 666-67.

The agency had reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment may be imposed.

¶10 In this appeal, the administrative judge found that, at the time it imposed the indefinite suspension, the agency had reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment could be imposed based on the following evidence: the appellant had been arrested, arraigned, and formally charged with six misdemeanor counts, each of which could have resulted in a penalty of at least six months' imprisonment; and the appellant had been released on \$10,000 bail and ordered to appear for a later-scheduled jury trial. *ID* at 8. The appellant challenges this finding on review,

arguing that the foregoing evidence was not sufficient to establish reasonable cause to believe that he committed a crime for which a sentence of imprisonment could be imposed. PFR File, Tab 1 at 5. More specifically, the appellant contends that the agency failed to satisfy the reasonable cause requirement because there was no evidentiary hearing finding probable cause on the merits of the charge. *Id.* at 11.

¶11 We disagree. As noted above, in *Dunnington*, the court found that a formal determination of reasonable cause made following a preliminary hearing usually provides “more than enough evidence” of possible misconduct to satisfy the reasonable cause requirement. 956 F.2d at 1157. The court did not find, however, that a formal judicial determination of reasonable cause made following a preliminary hearing is *required* to satisfy the reasonable cause requirement. In this case, at the time that the agency imposed the indefinite suspension, the California criminal prosecution was fully underway and the criminal justice process had moved beyond what would be addressed in a preliminary hearing. Therefore, the absence of a preliminary hearing is irrelevant to consideration of this case.

¶12 The appellant also argues on review, as he did below, that the reasonable cause requirement was not met here because the Board held in *Phillips v. Department of Veterans Affairs*, [58 M.S.P.R. 12](#), 14 (1983), *aff’d*, 17 F.3d 1443 (Fed. Cir. 1994) (Table), that a criminal complaint is insufficient to establish reasonable cause. PFR File, Tab 1 at 7; IAF, Tab 12 at 10. In *Phillips*, the administrative judge sustained the appellant’s indefinite suspension based on the filing of a criminal complaint charging him with a felony under Missouri law. *Phillips*, 58 M.S.P.R. at 14. The Board explained that, under Missouri law, the filing of a criminal complaint is only the first step in the information proceeding and that all persons are entitled to a preliminary hearing prior to the filing of any

information setting forth felony charges.⁴ *Id.* at 15. The Board found that because the appellant’s preliminary hearing was still pending at the time of his indefinite suspension, the filing of a criminal complaint was not a proper basis for the agency to find reasonable cause. *Id.*

¶13 In the initial decision, the administrative judge properly rejected the appellant’s argument that his indefinite suspension must be reversed pursuant to *Phillips*. *ID* at 6-7. As the administrative judge explained, this case is distinguishable from *Phillips* because the appellant in the instant matter was facing criminal misdemeanor charges, and not felony charges, as was the appellant in *Phillips*. *Id.* at 6. Misdemeanors in California are prosecuted by the filing of a complaint. *See* Cal. Penal Code § 740. Under California law, while a felony complaint is a preliminary accusation that does not confer trial jurisdiction, a misdemeanor complaint is a formal charge, an accusatory pleading giving the court jurisdiction to proceed to trial. *Serna*, 707 P.2d at 804-05. In fact, in misdemeanor prosecutions, the complaint is the only formal accusatory pleading filed with the court. *Id.* at 802. Thus, under California law, a misdemeanor complaint is comparable to an indictment.

¶14 Section 991 of the California Penal Code governs the determination of probable cause in misdemeanor cases. Under section 991(a), if a misdemeanor defendant is in custody at the time of his or her arraignment and pleads not guilty, the magistrate, on motion of counsel for the defendant or the defendant, “shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof.” The code does not

⁴ Similarly, under California law, a felony complaint is a preliminary accusation that brings the appellant before a magistrate for a preliminary hearing during which a magistrate determines whether there is probable cause prior to scheduling a trial. Cal. Penal Code § 866(b); *Serna v. Superior Court*, [707 P.2d 793](#), 804 (Cal. 1985). If it appears that there is sufficient cause to believe that the defendant is guilty, the magistrate then issues an order that the defendant be held to answer the complaint. Cal. Penal Code § 872(a).

provide for a probable cause determination when, as here, the defendant is not in custody at the time of arraignment. Thus, unlike *Phillips*, in this case there was not a preliminary hearing pending at the time of the appellant's indefinite suspension. Therefore, the basis of the Board's determination in *Phillips* that the administrative judge erred in finding that a criminal complaint is a proper basis for the agency to find reasonable cause, i.e., that a preliminary hearing in a felony matter was pending at the time of the appellant's indefinite suspension, is absent here.

¶15 It is undisputed that the agency issued the proposed indefinite suspension based on the court documents it obtained from the San Diego County Superior Court and that it did not conduct an independent investigation into the criminal charges against the appellant. IAF, Tab 8 at 7, Tab 9 at 35. As previously noted, however, in *Dunnington* the court found that in an appropriate case, the agency must be able to act on the basis of the facts presented to it, as an investigation may not always be possible, or the wisest course. *Dunnington*, 956 F.2d at 1156-57. This is such a case. At the time that the agency imposed the indefinite suspension, the California criminal matter was heading to trial. Consequently, the agency was in no position to conduct its own investigation. Indeed, as the appellant acknowledged in his written reply to the notice of proposed indefinite suspension, if the agency had attempted to conduct its own investigation, it would likely have been interfering with an ongoing criminal prosecution. IAF, Tab 5 at 44 of 84.

¶16 Under *Dunnington*, the touchstone of a finding of "reasonable cause" is whether the agency had sufficient facts to provide a sound basis for its action. *Ellis v. Department of Veterans Affairs*, [60 M.S.P.R. 681](#), 683 (1994). Because the agency indefinitely suspended the appellant based solely on information in the court documents referenced in the notice of proposed indefinite suspension, *see* IAF, Tab 5 at 56-65, we must determine whether that information provided the agency with reasonable cause to believe that the appellant had committed a crime

for which a sentence of imprisonment could be imposed. Here, the facts presented to the agency at the time it imposed the appellant's indefinite suspension showed that the District Attorney of San Diego had assessed the evidence and filed a complaint alleging that the appellant committed criminal acts involving two named individuals on a specific date and the case against the appellant had proceeded to the point where the appellant had been ordered to appear for a jury trial. We find that these facts provided the agency with reasonable cause to believe that the appellant committed a crime for which a term of imprisonment could be imposed. Therefore, we sustain the indefinite suspension.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.